IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL UNDER ARBITRATION ACT NO. 5 OF 1999.

State of Goa,
Represented by Executive
Engineer, Works Division V,
Irrigation Department,
Karapur Tisk,
Sanquelim, Goa. ... Appellant.

VERSUS

Shri Vaikunth J. Naik,
Civil Contractor,
House No. 6210,
Camarshet,
Near Dunlop Plot,
Curtorim, Salcete, Goa. ... Respondent.

Mr. H.R. Bharne, Government Advocate for the Appellant.

Mr. S.G. Dessai, Senior Advocate with Mr. Nitin P. Purishan, Advocate for the Respondent.

CORAM: A. M. KHANWILKAR, J.

DATE: 21ST NOVEMBER, 2003.

ORAL JUDGMENT:

This appeal takes exception to the Judgment and Decree passed by the Civil Judge, Senior Division, Bicholim, dated June 8, 1999 in Civil Misc. Application No.150/1994/A. By that Judgment and Decree the lower Court made the Award passed by the sole Arbitrator Shri Daniel Rodrigues dated July 30, 1994, as Rule of the Court under the provisions of the Arbitration Act, 1940. Briefly stated, the Respondent was awarded Construction of Inspection Bungalow in terms of Work Order dated 5th December,

1985. The stipulated date of commencement of work was 20th December, 1985 and the date of completion was 15th December, 1986. As the work was not completed, extension was granted on two occasions which was till 31st March, 1989, on which date the work is stated to have been completed. In the meantime however, the parties entered into supplementary agreement dated 20th March, 1989 by which date in fact, according to the respondent the entire work was completed and that Agreement was executed only to deny the claim of the respondent. It is not necessary to elaborate on this aspect of the matter. Suffice it to mention that in view of the dispute, the matter was referred for arbitration to the Sole Arbitrator by the Chief Engineer in terms of clause 25 of the principal Agreement dated 5.12.1985. Clause 25 of the said Agreement reads thus :-

> " Except where other wise provided in the contract that all the questions and disputes relating to the meaning of specifications, designs, drawings and instructions herein before mentioned and as to the quality of the workmanship or the materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates,

> instructions, order or these conditions or otherwise concerning the works, or the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof, shall be referred to the Sole arbitration of the person appointed by the Chief Engineer, Irrigation Department, Government of Goa, incharge of the work at the time of the dispute".

2. Before the Arbitrator the respondent submitted the Statement of Facts and Claims. The first Claim was in respect of a sum of Rs.43,619 which, according to the respondent, was due to him in the final bill for work executed previously in various items, extra items, substituted items, etc. This Claim was however withdrawn as the amount was paid to the respondent during the Arbitration proceedings. The respondent further claimed that besides the above mentioned amount, the respondent was entitled to a sum of Rs. 1,939.26 towards escalation in terms of Clause 10(CC) for the period 20.12.1985 to 14.12.1986 and a further sum of Rs.1,25,906.46 towards escalation in terms of Clause 10(CC) for the period 15.12.1986 to 20.3.1989. Accordingly the respondent claimed total sum of Rs.1,71,464.72 under the head of escalation in terms of Clause 10(CC). The second Claim of the respondent was interest in terms of the Interest Act, 1978. The respondent however claimed interest at the rate of

21% for three different periods namely pre-arbitration interest, pendente lite interest and post arbitration interest. The respondent also claimed cost of arbitration.

3. The appellant filed counter statement and contested the claim of the respondent. The Sole Arbitrator after considering the rival case passed the final Award as under :-

> " I, Adv. Daniel Rodrigues, the Sole Arbitrator, do hereby Award that the Respondent State of Goa, represented by the Executive Engineer, Works Div. V, Irrigation Department, Kerim, Sattari-Goa, shall pay to the Claimant, Shri Vaikunth J. Naik, the sum of Rs.1,25,906.46 together with simple interest thereon at the rate of 15% per annum starting from 31.3.1989 till the date of this Award till payment or till decree of the competent Court on this Award, whichever is earlier. "

4. This Award was filed before the Civil Judge S.D. at Bicholim along with Civil Misc. Application No.150/1994/A for making Rule of the Court. As mentioned earlier, the Civil Judge, S.D. confirmed the Award as passed by the Sole Arbitrator dated 30th July, 1994, by the impugned Judgment and Decree. Before this Court the decision of the Court below and the Award as passed by the Sole Arbitrator

is essentially challenged on four points which read as under, viz:

> (1) That as per the terms of reference the Arbitrator was asked to adjudicate and make speaking Award in respect of claims of the Contractor due to the escalation under Clause 10CC of the principle Agreement for scheduled items of work for which revised rates (reasonable) were agreed and paid as per Supplementary Agreement dated 20/03/1989. That the Ld. Arbitrator went beyond the terms of reference and being so he had no inherent jurisdiction to allow the claims in terms of his Award dated 30/07/1994.
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> (2) That when revision of rates were given as regards the scheduled items amounting Rs.75,549.11, whether the Arbitrator was justified in giving the escalation for the entire work executed by the Respondent on the basis of revised rates @ 100% when escalation under Clause 10CC provides 85% without considering the relevant document.
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> (3) When interest was not subject matter of reference, the Ld. Arbitrator had not jurisdiction to award interest which was awarded at the rate of 15% per annum from 31/03/1989 till the date of the Award till payment or Decree whichever is earlier on the awarded amount of Rs.1,25,906/-.
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> (4) Whether the amount awarded are overlapping ?

5. On the other hand, counsel for the respondent submits that there is no substance in any of the aforesaid contentions raised on behalf of the appellant. He has supported the reasons recorded by the Civil Judge S.D. for confirming the order as passed by the Sole Arbitrator.

6. Having considered the rival submissions the principal question that arises for consideration is whether the decision rendered by the Civil Judge S.D. merits any interference ?

7. With a view to answer the aforesaid decision, I shall first advert to the contention raised on behalf of the appellant that the Arbitrator has travelled beyond the Reference. In this context reliance was placed on the Order of appointment of the Sole Arbitrator dated 27th November, 1991. Emphasis was placed on the following extract of the said Order which reads thus :-

> " Therefore, in terms of power vested in me under the provisions of Clause 25 of the above referred principal agreement, I Shri R.C. Dharwad, Chief Engineer, Irrigation Department, Government of Goa, do hereby appoint Shri Daniel Rodrigues, Advocate, Above Goa Urban Co-operative Bank Ltd.,

> Ponda, Opp. Ponda Municipality, Ponda, Goa, as The Sole Arbitrator to adjudicate and make speaking award in respect of claims of the contractor due to escalation under clause 10 cc of the principal agreement for schedule items of the work for which the revised rates (reasonable) were agreed and paid as per supplementary agreement dated 20.3.1989 entered into subject to their admissibilities under Clause 25 of the agreement and without prejudice to the defence that may be raised by the Government regarding their admissibility of the claims on all necessary and available g rounds, including those of limitation and the parties to the agreement will be free to raise the question of limitations before the Sole Arbitrator. "

8. It was argued on behalf of the appellant that the Arbitrator has clearly travelled beyond the Reference as made above by the Chief Engineer, Irrigation Department now Water Resources Department. Reliance was placed on the decision of the Apex Court in **Union of India and others v. Santiram Ghosh and others,** reported in A.I.R. 1989 S.C., 402 and in the case of **M/s. Industrial Development Corporation of Orissa Ltd. v. Jajodia Overseas (P) Ltd.** reported in A.I.R. 1980 Orissa, 66. According to Mr. Bharne in view of the aforesaid decisions, if the appellant succeeds in establishing that the Arbitrator has travelled beyond the Reference, that would inevitably have the effect of misconduct committed by the Arbitrator in law. To get over this decision Mr.

Dessai for the respondent contends that none of the authorities referred to above will have application to the fact situation of the present case because, reference to Arbitrator has been made not by the Court or not by specific arbitration reference, but by virtue of the arbitration clause under the Agreement namely clause 25 reproduced above. He submits that it is only if the Reference was to be made by Court or specific reference was to be made to the Arbitrator, the above authorities would have some bearing on that aspect. Whereas, in the present case, under the agreement, by virtue of clause 25 of the Agreement, the Chief Engineer is the persona designata authorised to appoint Arbitrator and not make reference as such. Keeping this distinction in mind contends Mr. Dessai, the above authorities would be of no avail to the appellant. On the other hand, he has relied on the decision of the Apex Court in **M/s Sudarsan Trading Co. v. Government of Kerala and another** reported in **(1989) 2** S.C.C., 38 in particular para 31 thereof. Emphasis is placed on the following dictum in the said paragraph which reads as under :-

> " .... In Halsbury's Laws of England II, 4th edn., Vol.2, para 622 one of the misconducts enumerated, is the decision by the arbitrator on a matter which is

> not included in the agreement or reference. ...."

Mr. Dessai has also placed reliance on the recent decision of the Apex Court reported in (2002) 6 S.C.C., 201 in the case of **Shyama Charan Agarwala & Sons v. Union of India**, in particular para 13, and paras 14 to 18 thereof to support the above contention.

9. In my view, there is substance in the argument canvassed on behalf of the respondent. Indeed, in this case arbitration proceedings have been ignited on account of clause 25 of the Agreement which provides for resolution of the dispute between the parties by appointing an Arbitrator. Clause 25 however, merely authorises the Chief Engineer to appoint Arbitrator to examine the disputes and claims which are covered by clause 25 of the Agreement. Understood thus, it is not a reference made by the Court or a specific reference made to the Arbitrator as such. Whereas, the Chief Engineer merely appoints Arbitrator in terms of the arbitration clause. On such appointment being made, the Arbitrator would be bound to decide all the disputes and claims which are covered by clause 25 of the Agreement. In that sense, the Arbitrator would not be bound by the contents of the Order of appointment issued by the Chief Engineer which is pressed into service on behalf of the appellant. Reliance was placed by the

appellant on the decision reported in A.I.R. 1989 S.C. 402 (supra). In that case, it is seen seen from paragraph 4 that, as the Government did not agree with the recommendation made by the Third Pay Commission it appointed a Committee whereby the matter was referred to a Board of Arbitrators. In that context specific terms of reference were drawn and referred to the Board of Arbitrators. Whereas, in the present case, as mentioned earlier, the parties have entered into agreement providing for arbitration clause specifying the scope of arbitration as and when such occasion arises. The said clause 25 is only an enabling provision authorising the Chief Engineer of appointing the Arbitrator. No more and no less. Therefore, this decision will be of no assistance to the appellant. Reliance was then placed on the decision of the Orissa High Court reported in A.I.R. 1980 S.C., 66 (Supra). In that case, reference for arbitration was made by the Court under Section 20 of the Act of 1940. Accordingly,it was not an arbitration in terms of the Agreement or arbitration clause in the Agreement executed by the parties. In the circumstances, I find no substance in the grievance made before this Court on behalf of the appellant that the Arbitrator has travelled beyond the scope of the authority to adjudicate the claim set up by the

respondent. It is not possible to even remotely suggest that the claims as set up by the respondent were outside the scope of clause 25 of the Agreement. It necessarily follows that if the same was covered under clause 25 of the Agreement, the Arbitrator was well within his rights to adjudicate the said claims and record his opinion in that behalf.

10. That takes me to the next contention vehemently pressed into service by the appellant that, once the parties have accepted increase or revision in the price and have entered into supplementary agreement, that would automatically supercede the principal agreement. In which case, the respondent was not entitled to claim escalation in terms of clause 10(CC) of the principal agreement. For it presupposes that escalation is already reckoned while arriving at the revision of price as agreed in the supplementary agreement. This submission has been rightly resisted on behalf of the respondent by pointing out that the supplementary agreement by no stretch of imagination, eclipsed clause 10(CC) of the principal agreement. On the other hand, however, the supplementary agreement clearly upholds the principal agreement as can be discerned from the stipulation in clause 3 of the supplementary agreement which provides as follows :-

> " Except as modified by this Agreement, the Principal Agreement shall remain in full force and effect. "

11. In other words, the parties have agreed to give complete effect to the principal Agreement except the modified clauses in the supplementary agreement. There is no express clause in the supplementary agreement which would preclude the respondent from claiming escalation or to even remotely suggest that the escalation clause contained in the principal agreement namely, clause 10(CC) has been suspended or superceded in any manner. That takes me to the authorities cited across the Bar on behalf of the appellant. The first authority relied is reported in A.I.R. 1997 S.C., 980 in the case of **New India Civil Erectors (P) Ltd. v. Oil and Natural Gas Corporation.** In my view, this authority is of no assistance to the appellant. Moreover, the question that has been raised before this Court that the supplementary agreement or the fact that the parties have increased/revised the original price pre-supposes that the escalation clause has been suspended or waived was not in issue in this decision at all. Mr. Bharne for the appellant, had relied on Head-Note (C) of this decision which mentions that express stipulation as to price being firm and not subject to escalation due to increase in work, award

granting such amount would be beyond the authority of Arbitrator. That question does not arise in the present case. The next authority relied by Mr. Bharne is in the case of **Himachal Pradesh Nagar Vikas Pradhikaran v. M/s. Aggarwal and Co.** reported in A.I.R. 1997 S.C., 1027. Even this authority will be of no assistance to the appellant because in that case the Court has noted that the question of giving escalation at the rate of 25% did not arise as the raw materials were supplied by the Department and the entire burden of escalation was in fact, borne by the Department. Whereas, in the present case, the raw materials were supplied by the respondent and not the Department. In any case, the express provision such as clause 10(CC) of the principal Agreement having not been suspended, the question of not providing escalation to the respondent as claimed does not arise. Mr. Bharne has also placed reliance on the decision reported in Vol.99 1997 Bom.L.R., 617 in the case of **Municipal Corporation of Greater Bombay v. Thermal Engineering Corporation.** Even this decision of the Division Bench of our High Court will be of no assistance to the appellant. In that case the Court was concerned with adjudication of claim with reference to the terms of Contract. The Court observed that allowing additional escalation contrary to the prohibition contained in clause 75 - Vitiates

the Award. On the other hand in the present case there is express provision of providing escalation to the respondent such as clause 10(CC) of the principal Agreement and, as observed earlier, that clause is still in operation and, in fact, the supplementary agreement upholds that clause. In this view of the matter, there is no substance in the second contention raised on behalf of the appellant.

12. That takes me to the next contention raised by Mr. Bharne. According to him the Arbitrator has misconducted himself in awarding the entire claim of escalation as made by the respondent. He submits that even as per the principal agreement, clause 10(CC), the respondent would have been entitled only to 85% of the cost of works and not 100% as was claimed by the respondent and was mechanically granted by the Arbitrator.

13. Mr. Dessai has rightly drawn my attention to the claim in paragraphs 18 and 19 thereof. The said paragraphs read thus :-

> " 18. The Claimant submits herewith a statement at Annexure CA-2 showing the amount of escalation payable to him from the commencement of the contract i.e. from 20.12.1985 to the date originally stipulated for

> completion of the work i.e. till 14.12.1986. According to this statement, which has been calculated on a quantum of 85% of the work executed during that period, a sum of Rs.1,939.26 is due to the Claimant by the Respondents.
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> 19. The Claimant also submits herewith a statement at Annexure CA-3, showing the escalation payable to him during the prolonged period of the contract from 15.12.1986 to 20.3.1989. This escalation has been calculated on the 100% of the amount of work executed during that prolonged period and according to this statement a sum of Rs.1,25,906.46 is due to the Claimant by the Respondents. "

14. Relying on the aforesaid claim set up by the respondent, it is contended that the respondent had claimed quantum of 85% of the work executed during the period between 20.12.1985 till 14.12.1986 as was provided by clause 10(Cc) of the principal Agreement. Insofar as the subsequent period from 15th December, 1986 to 20th March, 1989 the respondent claimed escalation at 100% of the amount of work executed being sum of Rs.1,25,906.46,for such claim was not specifically restricted by clause 10(CC) of the Agreement and that the respondent was entitled to set up that claim in terms of clause 25 of the Agreement. In other words, it is contended that, insofar as the period between December, 1985 to December 1986 is concerned, that being governed by the principal agreement, the claim for escalation is

restricted in terms of clause 10(CC) of the agreement. Whereas for subsequent period from December, 1986 to March, 1989 since that was outside the contract period and there being no restriction in the agreement the respondent was entitled to claim at the rate of 100% in terms of the general law - that is Contract Act, instead of the discounted rate of 85% as per clause 10(CC) of the agreement. What is relevant to note is that although the respondent had specifically set up the above claim by bifurcating two periods, one governed by the contract and the other outside the contract period, in the counter statement as filed by the appellant, no objection whatsoever has been taken with regard to the said claim made by the respondent. On the other hand, in the counter claim filed by the appellant the only stand taken is that, in view of the revised rate and supplementary agreement, the respondent was not entitled to claim escalation at all, under the principal agreement by virtue of clause 10(CC). This is the only objection taken in response to the claim set up by the respondent. If that is so, it is not open to the appellant to now agitate this contention for the first time before the Court, as that question ought to have been put in issue before the Arbitrator in the first instance. As that was not done, that cannot be the basis for interfering with the Award.

It is well settled that the scope of interference in the Award postulated by Section 30 is circumscribed and the ground which was not taken before the Arbitrator cannot be allowed to be raised for the first time before the Court. In this view of the matter the grievance made on behalf of the appellant regarding the manner in which the claim of 100% set up by the respondent cannot be countenanced.

15. That takes me to the last contention vehemently argued on behalf of the appellant by Mr. Bharne. According to him the Arbitrator has misconducted himself in granting interest to the respondent. He submits that there is no provision in the Agreement for giving interest nor such a reference was made to the Arbitrator. He also submits that no claim regarding interest was set up by the respondent before the Arbitrator. Reliance has been placed on the decision of the Apex Court in **Secretary, Irrigation Department, Government of Orissa and others v. G.C. Roy** reported in A.I.R. 1992 S.C., **732** in paragraph 45 to contend that only when agreement between the parties does not prohibit grant of interest and where a party claims interest and that dispute is referred to the Arbitrator, the Arbitrator shall have the power to award interest pendente lite. He alternatively submitted that, at

best, the Arbitrator could have awarded pendente lite interest. He submits that in any case in view of the provisions of Interest Act, 1978 and the decision of the Division Bench of this Court reported in **U.P. Co-operative Federation Ltd. v. M/s. Three Circles,** 2000 Vol.102 (3) Bom. L.R. 430 the Arbitrator could not have awarded pre-arbitration interest in excess of 10% as that was the current rate of interest at the relevant time. Reliance was placed on paragraph 26 of this decision.

16. On the other hand, Mr. Dessai for the respondent contends that the respondent had set up claim not only regarding pendente lite interest but also pre-arbitration interest and post-arbitration interest as can be discerned from paragraph 34 of the claim. He submits that the issue regarding interest was also governed by arbitration clause 25 of the agreement and therefore the Arbitrator was competent to award interest. He further submits that the respondent having specifically claimed pre-arbitration as well as pendente lite and post-arbitration interest, the Arbitrator was justified in granting the same, though at the reduced rate of 15% instead of 21% as claimed by the respondent. He has rightly drawn my attention to the fact that the appellant in the counter statement

filed before the Arbitrator had raised only two contentions to oppose the claim of interest set up by the respondent. The first point was that there was no term of reference to the Arbitrator regarding grant of interest. The second point was that the claim is not under the provisions of the Interest Act and for which reason the Arbitrator could not have awarded interest. Insofar as the first objection taken by the respondent is concerned, I have already dealt with this aspect while considering the argument of the appellant that the Arbitrator has travelled beyond the reference. On the same reasoning this argument will have to be rejected. In other words since the claim of interest could be examined by the Arbitrator in terms of clause 25 of the Agreement as it provides that any claim in relation to the agreement can be gone into by the Arbitrator, the Arbitrator was competent to pass Award on the claim of interest also.

17. Reliance has been rightly placed by Mr. Dessai on the decision of the Supreme Court in the case of **State of Orissa v. B.N. Agarwalla, A.I.R.** 1997 S.C., 925 - paragraph 18. The Apex Court has observed that it is well settled that the Arbitrator has jurisdiction to award pre-reference interest in cases which arise after the Interest Act, 1978 has

become applicable. In the present case the principal agreement has been executed after 1978 as well as the arbitration proceedings also commenced after 1978. Therefore as the respondent had specifically set up claim for pre-arbitration interest, the Arbitrator was well within his right in awarding that interest. This view would also answer the second objection taken on behalf of the appellant that the claim is not that under the provisions of the Interest Act, as the Apex Court has observed that the Arbitrator is entitled to grant pre-arbitration interest/appropriate interest in a given case. Insofar as interest pendente lite is concerned, even that was specifically claimed by the respondent. In that view of the matter, the Arbitrator was well within his power in adjudicating that claim and allowing the same in favour of the respondent. Even with regard to post-award interest is concerned, I find no reason to disturb the view taken by the Arbitrator that such interest could be granted.

The only argument that remains to be considered is with regard to the rate of interest awarded by the Arbitrator in respect of pre-arbitration period. The Arbitrator has awarded uniform rate of 15% interest for all the three different periods. However so far as the

pre-arbitration period is concerned the Arbitrator gets power to award interest by virtue of Section 3 of Interest Act, 1978. That provision postulates that the Arbitrator could award interest commensurate with the current rate of interest. In that sense Mr. Bharne is justified in relying on the decision of the Division Bench of this Court in U.P. Cooperative Federation Limited (Supra) which has taken the view that the Arbitrator cannot grant interest at more than current rate of interest for pre-reference period. There is nothing on record to indicate as to what was the current rate of interest for pre-reference period. In this view of the matter the Award as passed by the Arbitrator can be questioned only to this limited extent because that would be mis-conduct in law, as the Arbitrator has awarded interest beyond the scope of power bestowed on him by virtue of Section 3 of the Interest Act. That inquiry will have to be undertaken by the Arbitrator. However, Mr. Dessai for the respondent submits that taking cue from the decision of this Court in U.P. Cooperative Federation Ltd. (Supra) the Respondent would accept reduced interest in respect of pre-reference period to 10% P.A., which was the current rate of interest at the relevant time, as can be seen from the position stated in the reported decision in paragraph 26 thereof of this Court. If

that is so, instead of remitting the matter to the Arbitrator for this limited purpose, this Appeal would partly succeed only to this limited extent by modifying the Award as well as the Decree passed by the Civil Judge S.D. by reducing the rate of interest for pre-reference period (i.e. 31.3.1989 to 30.4.1994) at the rate of 10% per annum.

18. Accordingly this appeal partly succeeds. The Award as well as the Decree stands modified only to the limited extent of rate of interest for the pre-reference period i.e. from 31st March, 1989 till 30th April, 1994 which was the first date of hearing of the arbitration proceedings (Arbitrator entering upon the Arbitration). Rest of the Award and Decree as passed by the Court below to remain as it is. No order as to costs.

A.M. KHANWILKAR, J.

sl.